IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.03.2007

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
and
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

T.C. (Appeal) No.178 of 2003

Sri.K.Mahendar .. Appellant

versus

The Commissioner of Income-tax
Chennai-34. .. Respondent

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order dated 21.8.2001 in ITA No.185/Mds/1996 and C.O.No.24/Mds/1996 on the file of the Income Tax Appellate Tribunal, Madras Bench 'C' against the order dated 14.11.95 in ITA.No.59/95/96 City Ward II on the file of The Commissioner of Income Tax (Appeals) VI - Madras - 600034 as against the order dated 30.01.95 in PA.No.GIR.No.138-H on the file of the Income Tax Officer, City Ward II (2), Madras - 600034.

For appellant : Mr.R.Janakiraman
For respondent : Mrs.Pushya Sitaraman
Senior Standing Counsel for
Income Tax

JUDGMENT

(Judgment of the Court was delivered by CHITRA VENKATARAMAN,J.)

This appeal is by the assessee challenging the order of the Tribunal on the following substantial questions of law:

" (i) Whether on the facts and in the circumstances of the case the Income-tax Appellate Tribunal was right in law in holding that the sum of Rs.2,02,624/- has to be assessed as "capital gains" in the assessment year 1991-92 under Section 45(5)(b) of the Income-tax Act, 1961?

(ii) Whether the Income-tax Appellate Tribunal on the facts and circumstances of the case was right in law in upholding the applicability of Section 148 of the Income-tax Act, 1961 especially when all the facts were placed before the assessing authority even while filing the return and at the assessment stage itself?

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

2. The assessee and his brothers received certain lands in a partition in the year 1956 made by their father who died in the year 1969. The said lands were acquired by the Government in the land acquisition proceedings. The assessee received compensation from the Government for the first time in the Assessment Year 1984-85. The assessee went on appeal against the compensation granted under the acquisition proceedings before the Sub Court, Poonamallee, which ordered additional compensation together with interest. Both the assessee as well as the State went on appeal before the High Court. Till the assessment year 1990-91, the additional compensation received was admitted in the returns. In the Assessment Year 1991-92, the assessee received additional compensation of Rs.2,02,624/-. The assessee claimed exemption of this compensation by making an entry in Part-IV of the income tax return. In the proceedings taken under Section 148, the assessing authority held that in view of the insertion of the Section 45 (5)(b) with effect from the Assessment Year 1988-89, the additional compensation of Rs.2,02,624/- received by the assessee was taxable under Section 45(5)(b). It was pointed out that the State Government obtained stay from the High Court, Madras; that it ordered release of 50% of the enhanced compensation.

3. It is seen that the Assessing Officer rejected the assessee's reliance on the decision reported in 161 ITR 524 (CIT Vs. HINDUSTAN HOUSING & LAND DEVELOPMENT TRUST), taking the view that the decision of the Apex Court would apply only to cases where the additional compensation was assessed on accrual basis. The Assessing Authority further pointed out that under Section 155(7-A) (since omitted with effect from 1.4.1992) introduced the Finance Act, 1978 with effect from 1.4.1974 and amended by the Direct Tax Laws (Amendment) Act, 1978 with effect from 1.4.1988, the additional compensation was liable to be calculated for the purpose of working out the capital gains in the year in which the amount was received by the assessee. Noting the difference between the law as it stood prior to the amendment by the Finance Act, 1987, and the law as on 1988-89 with reference to Section 45(5)(b) that the enhanced compensation would be brought to tax on receipt basis, the assessing authority held that the said sum was liable to be considered for the purpose of capital gains in the assessment year concerned, namely, 1991-92.

WEB COPY

4. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals), contending that the law declared by the Supreme Court in the decision reported in 161 ITR 424 (CIT Vs. HINDUSTAN HOUSING & LAND DEVELOPMENT TRUST) still governed the issue even after the amendment.

5. By order dated 14.11.1995, the Commissioner of Income Tax (Appeals) allowed the appeal. On the question of reopening the assessment, he held that the Assessing Officer was within his jurisdiction to do so. The Commissioner of Income Tax (Appeals) also noted that the High Court, in its order, allowed the assessee to withdraw a part of the amount deposited by the Government. Thereafter,

https://hcservices.ecourts.gov.in/hcservices/

in the appeal preferred before the Apex Court as against the order of this Court in its order dated 25.7.1990, the Supreme Court allowed the withdrawal of the said amount of 50% of compensation on the claimant assessee filing a written undertaking to return the same with interest if called upon. On the question of applicability of Section 45(5)(b), the Commissioner of Income Tax (Appeals) agreed with the assessee that the question as regards the right to enhanced compensation was still a matter to be adjudicated upon by the High Court, and hence the assessee did not have the right to receive the enhanced compensation amount. The question of capital gains could be considered in the year in which the matter was finally decided by the High Court. In so holding, the Commissioner of Income Tax (Appeals) followed the decision of the Supreme Court reported in 161 ITR 534 (CIT Vs. HINDUSTAN HOUSING & LAND DEVELOPMENT TRUST). Thus, on merits, the Commissioner of Income Tax (Appeals) allowed the appeal.

6. The Revenue preferred an appeal before the Income Tax Appellate Tribunal, challenging the correctness of the order of the Commissioner of Income Tax (Appeals) on the question of assessability of the compensation enhanced, then pending before the High Court for final verdict. The assessee filed a cross appeal and challenged the order of the Commissioner of Income Tax (Appeals) that the appellate authority erred in not giving a clear direction that the entire amount of Rs.2,02,624/- received from the Sub Court, Poonamallee, was not income and hence, taxable; that the Income Tax Officer bifurcated the said amount, treating the sum of Rs.1,34,998/- as capital gains and Rs.67,626/- as income from other sources, it being the interest on additional compensation. The assessee challenged the reopening of the assessment under Section 148. By order dated 21.8.2001, the Income Tax Appellate Tribunal allowed the Revenue's appeal, holding that in terms of Section 45(5)(b) of the Income Tax Act, introduced in the statute in the Finance Act, 1987, the assessee was liable to be assessed on the additional compensation. As regards the cross appeal preferred by the assessee, the Tribunal held that the intimation sent under Section 143 (1)(a) is subject to scrutiny and regular assessment under Section 143 (3). The non-application of the provisions of Section 45(5)(b) is a serious irregularity and the same has to be corrected in the course of regular assessment. Considering the amendment brought forth under the Finance Act, 1987 and the introduction of the provisions of Section 45 (5)(b), the Tribunal viewed that the assessee was liable to be assessed to capital gains on the additional compensation received and that the decision of the Apex Court reported in 161 ITR 524 (CIT Vs. HINDUSTAN HOUSING & LAND DEVELOPMENT TRUST) was concerned with the provision prior to the amendment under Section 45(5), which was given effect to from 1.4.1988. In the circumstances, the said sum was liable to be assessed under the provisions of Section 45(5)(b). Consequently, the Tribunal confirmed the assessment; thereby the liability to capital gains tax.

7. The assessee has now come on appeal before this Court, challenging the said order of the Tribunal. He contended that the introduction of the amendment to Section 45(5) did not have the effect of nullifying the decision of the Supreme Court reported in 161 ITR 524

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

(CIT Vs. HINDUSTAN HOUSING & LAND DEVELOPMENT TRUST). The assessee further contended that the right to receive the compensation and its character as an income would arise or accrue only after the final determination of the right of the assessee to the enhanced compensation. Consequently, the ruling of the Supreme Court reported in 161 ITR 524 (CIT Vs. HINDUSTAN HOUSING & LAND DEVELOPMENT TRUST) would apply in full force to the facts of the case. The assessee also questioned the Tribunal's order in dismissing the cross objection that the action taken under Section 148 was well within law.

8. Learned counsel appearing for the assessee submitted that the Tribunal ought to have considered the decision of the Apex Court in proper perspective to grant the relief.

9. Learned counsel appearing for the assessee pointed out to the passages from the decision of the Apex Court to contend that the amendment had not brought forth any change in the declaration of law by the Apex Court. He also referred to the order of the Apex Court dated 14.11.1991 in C.A.No.3094 of 1990 etc. and to the order of this Court dated 22.12.1997 in A.S.Nos.1122 of 1990 etc.; that the mere receipt of money under an undertaking does not make the recipient as having received the income; that until such time the dispute reaches a finality, the recipient need not claim it as his income. In these circumstances, placing reliance on the decision of the Karnataka High Court reported in [2004] 267 ITR 67 (CHIEF CIT Vs. SMT.SHANTAVVA), the assessee submitted that the decision of the Karnataka High Court fully governed the case and hence, prayed for setting aside the order of the Tribunal.

10. Learned counsel appearing for the assessee submitted that the assessee was permitted to withdraw a portion of the enhanced compensation only under orders of the Court and after filing a written undertaking, to return the same with interest, if called upon to do so. The holding of the said sum, hence, was as per the orders of the Court, pending a final outcome in the appeal preferred by the State. In the above circumstances, learned counsel appearing for the appellant submitted that the final determination of tax is based on the amount of compensation receivable by the assessee, the receipt on an undertaking given did not have the character of income to attract the provisions of Section 45(5). Given the circumstances that the final determination on the amount of compensation was still a matter pending before the High Court, he pointed out that the ratio laid down by the Supreme Court in the decision reported in 161 ITR 524 (CIT Vs. HINDUSTAN HOUSING & LAND DEVELOPMENT TRUST) applies to the facts of the case. In this connection, he also placed reliance on the decision reported in [1974] 95 ITR 614 (SHAH VRAJILAL MADHAVJI Vs. CIT), apart from [2004] 267 ITR 67 (CHIEF CIT Vs. SMT.SHANTAVVA), rendered by the Karnataka High Court. Hence, he prayed that the plea be accepted.

11. Learned standing counsel appearing for the Revenue, however, supported the orders of the Tribunal, placing reliance on Section 45(5) and the purpose of introduction of the same.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

12. A perusal of the documents filed before this Court reveal that by order dated 9.4.1990, the Supreme Court, while granting the Special Leave, ordered as follows:

> " It is not necessary to consider the validity of the High Court order in view of the consent that is given by the claimants in this case. The claimants have filed a counter affidavit dated 9.4.1990 stating that they have no objection to the Housing Board being impleaded as a party or co-appellant in the pending appeals before the High Court. They have also stated that they would give consent to any applications for receipt of additional evidence if the Housing Board comes forward with such applications subject to the liberty reserved to them to adduce rebuttal evidence. They have further stated that they would not oppose the applications of the Housing Board under Section 5 of the Limitation Act.
>
> In the light of the statements contained in the counter affidavit of the claimants, we dispose of these SLPs. No order as to costs. Stay granted in this case shall stand vacated. Claimants may move the High Court for appropriate order for withdrawing the compensation amount. "

13. The order in the main appeal was passed by the High Court after remand from the Supreme Court only on 22.12.1997. The further Special Leave Petition preferred was dismissed by the Supreme Court on 22.1.1999. Hence, at least till orders on the question of additional enhanced compensation reached a finality, the amount received by the assessee as per the orders of the Supreme Court was on the basis of a written undertaking given by the assessee to return the receipt of 50% of the enhanced compensation with interest.

14. Dealing with the contention based on the decision of the Supreme Court reported in 161 ITR 524 (CIT Vs. HINDUSTAN HOUSING & LAND DEVELOPMENT TRUST), the Assessing Authority took the view that the provisions of law under the Finance Act of 1987 made the difference that the amendment itself was brought about to cover cases of capital gains arising out of additional compensation even in cases where finality had not been reached.

15. It is an admitted fact that Section 45(5)(b) was inserted with effect from 1.4.1988 to cover cases of receipt of enhanced compensation that they shall be deemed as income chargeable; that they shall be considered for chargeability under the head "capital gains" of the previous year in which such amount was received by the assessee.

16. The provisions of Section 45(5)(b), as are relevant to the case on hand, reads as follows:

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

" Section 45(5):
Notwithstanding anything contained in sub-section (1), where the capital gain arises from the transfer of a capital asset, being a transfer by way of compulsory acquisition under any law, or a transfer the consideration for which was determined or approved by the Central Government or the Reserve Bank of India, and the compensation or the consideration for such transfer is enhanced or further enhanced by any Court, Tribunal or other authority, the capital gain shall be dealt with in the following manner, namely:-
(a) ....
(b) the amount by which the compensation or consideration is enhanced or further enhanced by the court, Tribunal or other authority shall be deemed to be income chargeable under the head "capital gains" of the previous year in which such amount is received by the assessee;
(c) ...
Explanation:-- for the purposes of this sub-section, --
(i) ...
(ii) ...
(iii) where by reason of the death of the person who made the transfer, or for any other reason, the enhanced compensation or consideration is received by any other person, the amount referred to in clause (b) shall be deemed to be the income, chargeable to tax under the head "capital gains", of such other person. "

17. A perusal of Section 45(5) shows that two conditions are to be satisfied for the application of the Section, namely, the capital gains must arise from the transfer of a capital asset by way of compulsory acquisition under any law and the compensation for such transfer is enhanced or further enhanced by any Court or Tribunal or other authority.

18. The purport of introduction of Section 45(5) needs to be noted. It is seen that the additional compensation is awarded at several stages by different appellate authorities. This necessitated rectification of the original assessment under the Income Tax Act at each stage. To provide for rectification of the assessment of the year in which the capital gain was originally assessed, Section 155(7-A) was introduced. Section 155 (7-A) of the Income Tax Act, 1961, enabled the Income Tax Officer to re-compute the capital gains arising from the transfer of the capital asset by taking the enhanced compensation to be the full value of the consideration received or accrued as a result of the transfer. Thus the provision enabled re-computation by providing for a period of limitation of four years to be reckoned from the end of

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

the previous year in which the additional compensation was received by the assessee. However, difficulties were also experienced in cases where the additional compensation is received by a person other than the original transferor where the legal heirs stepped into the shoes of the original owner. Repeated rectification of assessment on account of the enhanced compensation at different stages often resulted in mistakes of computation of tax liability. To remove these difficulties, sub section (5) of Section 45 was inserted by the Finance Act, 1987, to provide for taxation of additional compensation in the year of receipt in respect of the transfer of capital asset. The explanation to sub section (5) of Section 45, particularly to clause (iii), shows that where by reason of the death of the original owner or for any reason, the enhanced compensation is received by any other person, the amount referred to in Clause (b) shall be deemed to be the income of such other person chargeable to tax under the head of capital gains of the previous year in which such amount is received by the assessee. The cost of acquisition in the hands of the recipient is deemed to be nil. The streamlining of the provision amply makes it clear that the assessability of the enhanced compensation chargeable under the head "capital gains" is only with reference to the previous year in which such amount is received on a final settlement of the quantum of compensation by the Court. A reading of the provision leaves no room for any interpretation that unless and until the right becomes an enforceable right, the mere claim cannot be regarded as a receipt to attract the provisions of Section 45(5)(b). With the claim for enhanced compensation under dispute and the same pending during the Assessment Year under consideration, conditional receipt does not bestow the character of income under Section 45(5)(b).

19. In the decision of the Apex Court reported in [1954] 26 ITR 27 (E.D.SASSOON AND CO. Vs. CIT), it has been held that to have the character of income, a debt must have come into existence and the assessee must have acquired a right to receive the payment. The Apex Court held that unless and until there exist "a debt or a right to receive the payment or in other words a debitum in praesenti, solvendum in futuro, it cannot be said that any income has accrued to him." In the light of the above-said law laid down by the Apex Court, the stand of the assessee merits to be accepted.

20. Interpreting the provisions of Section 45(5)(b), the Karnataka High Court, in the decision reported in [2004] 267 ITR 67 (CHIEF CIT Vs. SMT.SHANTAVVA), took the view that:

> " Section 45(5)(b) will be attracted only when the assessee receives the "enhanced compensation", in pursuance of a final award/order of a court, Tribunal or other authority increasing the compensation. If any amount is received after stay of the award, in pursuance of any interim order, as a payment subject to the final result, it will not be an amount received as "enhanced compensation" contemplated under section 45(5)(b), but only an interim payment received subject to final decision. It will attract

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

section 45(5)(b) only when the final decision is rendered. We are supported in the said view by a decision of the Supreme Court and a decision of this court. "

21. The decision of the Supreme Court reported in 161 ITR 524 (CIT Vs. HINDUSTAN HOUSING & LAND DEVELOPMENT TRUST) relied on by the assessee and referred to in the above decision may also be noted. It related to a case of an award granted in respect of compulsory acquisition of land. It was taken up on appeal by the land owner. The Arbitrator made an award enhancing the compensation to Rs.30,10,873/- as against the award at a sum of Rs.24,97,249/-, and interest at 5% from the date of acquisition was also ordered. The State went on appeal to the High Court. Pending the appeal, the State Government deposited a sum of Rs.7,36,691/-, being the additional amount payable under the award. The claimant was permitted to withdraw the said amount on furnishing a security bond for refunding the amount in the event of the State succeeding the appeal. The assessee credited the amount in a suspense account on the same day. The said amount was assessed at the hands of the assessee in respect of the Assessment Year 1956-57 on the ground that it became payable pursuant to the Arbitrator's award dated 29.7.1955. The Tribunal held that the amount did not accrue to the assessee as its income during the relevant previous year ended on March 31, 1956 and hence, not taxable in the Assessment Year 1956-57. On further appeal, the High Court affirmed the decision of the Tribunal. The Apex Court confirmed the view of the Calcutta High Court. Referring to the decision reported in [1954] 26 ITR 27 (E.D.SASSOON AND CO. Vs. CIT), the Apex Court held, the terms "arising or accruing" referred to a right to receive profits and that there must be a debt owed by somebody. Considering the fact that the assessee therein was permitted withdrawal only on furnishing security bond for refunding the same in the event of the appeal being allowed, the Apex Court held that "there was no absolute right to receive the amount at that stage. If the appeal was allowed in its entirety, the right of payment of enhanced compensation would have fallen altogether." The Apex Court also referred to the decision of the Gujarat High Court reported in [1978] 114 ITR 237 (TOPAN DAS KUNDANMAL Vs. CIT) to hold that the additional compensation which are inchoate or contingent, would not create a debt that only on a final determination of the amount of compensation that the right to such income in the nature of compensation would arise or accrue, and till then, there was no liability in praesenti in respect of additional amount of compensation claimed by the owner of the land. The Supreme Court pointed out that there was a clear distinction between a case where the right to receive payment is in dispute and it is not a question of merely quantifying the amount to be received and cases where the right to receive payment is admitted and the quantification is left to be determined in accordance with the settled or accepted principles. The Apex Court pointed out that the enhanced compensation accrues only when it becomes payable, i.e., when the Court accepts the claim.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

22. This Court had an occasion to consider the question as regards the nature of receipt of the amount as per the interim conditional orders in State appeal in land acquisition matters pending before the Court. In the decisions reported in 282 ITR 614 (CWT/CIT Vs. SMT GIRIJA AMMAL) and 289 ITR 245 (ANIL KUMAR FORMA (HUF) Vs. CIT), this Court held that the additional compensation received could not be treated as part of the compensation received for the transfer of the land until it is finally determined by the High Court or the Supreme Court. The decision reported in 289 ITR 245 (ANIL KUMAR FORMA (HUF) Vs. CIT) followed the decision reported in 282 ITR 614 (CWT/CIT Vs. SMT GIRIJA AMMAL). The view expressed therein fully covers the issue here too.

23. It may be seen that following the decision of the Supreme Court reported in 161 ITR 524 (CIT Vs. HINDUSTAN HOUSING & LAND DEVELOPMENT TRUST), a similar view was also taken by the Allahabad High Court in the decisions reported in 246 ITR 622 (CIT Vs. LAXMAN DASS) and [2004] 267 ITR 67 (CHIEF CIT Vs. SMT.SHANTAVVA). These decisions relate to the period prior to the amendment.

24. In the light of the decisions of the Apex Court and this Court referred to above, we accept the stand of the assessee and allow the appeal on the issue relating to capital gains.

25. On the question of reopening of the assessment, we do not find any error in the order of the Tribunal. The proceedings taken do not suffer from any illegality to warrant an interference by this Court. No serious argument was however made by the appellant too.

26. Considering the view that we have taken as to the scope of Section 45(5)(b), we allow the Tax Case Appeal on the question of assessability under Section 45(5)(b) of the Income Tax Act, 1961 and thereby set aside the order of the Tribunal. The appeal is allowed in part. No costs.

Sd/
Asst.Registrar

WEB COPY

/true copy/

Sub Asst.Registrar

ksv

https://hcservices.ecourts.gov.in/hcservices/

To:

1. The Assistant Registrar,
Income-Tax Appellate Tribunal
Madras Bench 'C',
Rajaji Bhavan, III Floor,
Besant Nagar, Chennai - 90.

2. The Commissioner of Income Tax (Appeals)
Madras - 600034.

3. The Commissioner of Income Tax-I
Chennai-34.

4. The Income Tax Officer,
City Ward I(2), Madras - 34.

1 cc To Mr.R.Janakiraman, Advocate, SR.17357.
1 cc To Mr.Pushya Sitaraman, Sr.Standing Counsel
for I.T.Cases, SR.17240.

T.C. (Appeal) No.178 of 2003

MS(CO)
RVL 16.10.2007

HIGH COURT OF JUDICATURE MADRAS
सत्यमेव जयते
WEB COPY

https://hcservices.ecourts.gov.in/hcservices/